(1)

91-2064

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

SUMMER TERM 1992

MARY LOU GRAHAM, PETITIONER

VS.

JEAN GOLDSTEIN, RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE **SUPREME COURT OF MISSOURI**

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417-889-1776

COUNSEL en
Propia Persona

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ATTORNEY for
Respondent
Bar #22660

QUESTIONS PRESENTED

(1) Whether Missouri State Rev. STATUTE 575.150 -(RSMo. 1977S.B.60) / on 1-1-79 Subsection #3 permits law enforcement officer to violate U.S.C.AMENDMENT FOUR by permiting unlawful arrest and removing common law right of SELF-DEFENSE of victim of unlawful arrest?

(2) If RESPONDENT whose failure to file TIMELY Notice of Appeal in PETITIONER'S court action, causing its dismissal from Eighth Circuit Federal Court of Appeals, did also deprive PETITIONER of the same rights which had been denied her by police officer against whom the original U.S.C. 42 § 1983 action had been filed?

TABLE OF CONTENTS

TITLE	PAGE NO.
QUESTIONS PRESENTED	i
CONTENTS	ii
TABLE OF AUTHORITIES	iii
LEGAL and CONSTITUTIONAL SOURCES	iv, v, vi. vii, viii.
PETITION FOR WRIT	1.
COURT OPINIONS LISTED	2
JURISDICTIONAL STATEMENT	3
STATEMENT OF THE CASE	4, 5, 6, 7
REASONS FOR GRANTING PETITION	8 9, 10, 11, 12, 13, 14, 15, 16,
CONCLUSION	17
COURT APPENDIX "A"	18
COURT APPENDIX "B"	19
COURT APPENDIX "C"	20
COURT APPENDIX "D"	21
COURT MEMORANDUM "E"	22
CONCLUSION	44

TABLE OF AUTHORITIES

CASES	PAGE NO
BROWN V. STATE OF TEXAS, 443 U.S. 47; 61 L. ED. 2d 357 . .	13
CASTELLANO V. TRAVELERS INS. CO. 305 F. Supp. 2d, 467. . .	17
FISKE V. BUDER, 8th Circ., 125 F. 2d 841 . . .	11
GAST v. EBERT, 739 S.W. 2d 545	10
KANSAS CITY v. FULTON, 533 S. W. 677, ...	14
KOLANDER v. LAWSON, No. 81-1320, 33,Cr. L. 3063 May 4, 1981.	15
McKIM v. SEARS RODEO ASSN. 789 S. W. 2d 217	10
STATE V. MAXEY, 661 S. W. 641, ...	14
RE: TESSLER, 783 S. W. 2d 906, (Mo. Banc 1990)	11
Revised MissouriStatue 575.150	.vii.
RSMo. 484.160 . .	viii.

BEST AVAILA

TABLE OF AUTHORITIES

U.S. CONSTITUTION, Amendment V....

U.S. CONSTITUTION Amendment IV.

U.S. CONSTITUTION, Amendment XIV.

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE V. OF U.S. CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be com-pelled to be witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

ARTICLE IV.

The right of the people to be secure

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in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particulary describing the place to be searched, and the persons or thing to be seized.

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or endorse any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property. without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

AMENDMENT VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States than according to the rules at common law.

CONSTITUTION OF STATE OF MISSOURI

Article 1 Section Five _ _

"That the people shall be secure in their persons,papers, homes and effects from unreasonable searches and seizures; and no warrant to search any place or seize any person or thing shall issue without describing the place to be searched, or the person or thing to be seized, as nearly as may be; nor without probable cause, supported by written oath or affirmation."

MISSOURI REVISED STATUTES

(RSMo.V.R.M.S) 575.150

RESISTING OR INTERFERING WITH ARREST.

-1. A person commits the crime of resisting or interfering with arrest if, knowing that a law enforcement officer is making an arrest, for the purpose of preventing the officer from effecting the arrest, he:

(1) Resists the arrest of himself by using or threatening the use of violence or physical force or by fleeing from such officer; or

(2) Interferes with the arrest of another person by using or threatening the use of violence, physical force or physical interference.

2. This section applies to arrests with or without warrants and to arrests for any crime or ordinance violation.

3. It is no defense to a prosecution under subsection 1 of this section that the law enforcement officer was acting

unlawfully in making the arrest. However, nothing in this section shall be construed to bar civil suits for unlawful arrest.

RSMO. JUDGMENT FOR COSTS AND DAMAGES RENDERED AGAINST ATTORNEY when

If an attorney or counselor at law shall commence an action and fail to prosecute the same, or if any action so commenced shall be dismissed for want of his attention, or if he shall bring the wrong action and it be necessary to enter a nonsuit, or lif it shall be made to appear to the court that the action was erroneously brought, dismissed, or nonsuit entered in consequence, the court may, in its discretion, enter up judgment against any such attorney or counselor at law for the full amount of costs thereby incurred, and all damages in consequence thereof.

NO._____

IN THE SUPREME COURT OF THE UNITED STATES

SUMMER TERM, 1992

Mary Lou Graham, Petitioner

vs.

Jean Goldstein, Respondent

PETITION FOR WRIT OF CERTIORARI

To the **SUPREME COURT OF MISSOURI**,of

The Honorable Chief Justice and Associate Justices of the Supreme Court:

Mary Lou Graham, Petitioner requests that a Writ of Certiorari issue to review judgment of Supreme Court of Missouri affirming Summary Judgment for Respondent, thus denying Petitioner's jury trial which was her only remedy for relief from deprivation of Constitutional Rights under Fourth,Fifth, Seventh, Fourteenth Amendments in Cause No. 74518 ordered on March 24, 1992.

OPINIONS

"A" Order filed by Hon.Ron.Belt,Oct. 24, 1990, granting SUMMARY JUDGMENT for Respondent.

"B" Order and Memorandum - MISSOURI COURT OF APPEALS,WESTERN DISTRICT affirming lower court, - issued July 30, 1991.

"C" SUPREME COURT OF MISSOURI overruling petition for relief on February 25, 1992.

"D" SUPREME COURT OF MISSOURI overruling motion for rehearing on March 24, 1992.

"E" MISSOURI COURT OF APPEALS
WESTERN DISTRICT

MEMORANDUM SUPPLEMENTING ORDER

AFFIRMING JUDGMENT PURSUANT TO

RULE 84.16 (b)

JURSIDICTIONAL STATEMENT

Missouri Constitution Article 3, Sec. 2, create all causes containing civil rights or Federal and/or State Constitutional Rights to come into view of the Missouri Supreme Court. This highest court of Missouri over-ruled Petitioner's motion for rehearing March 24, 1992,thus this cause invokes protection of Fourth,Fifth,Seventh and Fourteenth Amendments guaranting protected CIVIL RIGHTS to Petitioner and under U.S.C 1254 and 42 U.S.C. Chapter 1983.

STATEMENT OF THE CASE

May 15, 1981, Petitioner was en route to her home after having taken her daughter to a school banquet in the City of Joplin, Missouri. About 8:00 P.M. while returning to her home, she passed a police car which was parked near the center of the street forcing her to swerve left into oncoming traffic lane. While passing, she honked the horn twice. Deciding to buy milk for next morning, she headed toward a convenience store, but turned back toward home after discovering that she had spent most of her money preparing the car for a trip canoeing with a couple foreign students the next day. She noticed a police car at an intersection, motioned him to go ahead since he arrived first. He didn't move, so she proceeded on her way. The police car came up behind her car and signaled her to stop.

Petitioner stopped, walked back to ask officer what she had done wrong. Appearing angry, the officer did not answer her question, but inquired if she had I.D. She assured him she did, but again asked to know what violation she was being charged. He walked with her back to her car again asking for identification, still refusing to tell her what crime she had committed.

After advising officer that she intended to go since there was no reason to remain, Petitioner turned to enter her vehicle. The police officer grabbed her left arm and screamed that she was under arrest. Since his right hand came on her left breast, she bit his thumb to thwart the attack. He hit her in the upper back knocking her unconscious, handcuffed her, caused her to be jailed and charged with assaulting a police officer, refusing to produce I.D. and

resisting arrest. Petitioner brought a U.S.C.42, 1983 action against officer in federal district court, Joplin, Mo. 1984 for Assault & Battery, Deprivation of her Fourth Amendment Rights, False Arrest.

Jury awarded Police Officer punitive damages of $25,000 on his cross-claim and $3,500 attorney fees. Petitioner obtained legal services of Attorney Jean Goldstein, Columbia, Mo. to appeal the erroneous verdict to Eighth Circuit Court of Appeals. Denial of New Trial was filed by Magistrate Richard Ralston May First, 1986. July 1, 1986, Goldstein filed REQUEST FOR LEAVE TO FILE NOTICE OF APPEAL OUT OF TIME in federal court. This was denied and Petitioner's cause was dismissed. Without recourse in court, Petitioner's only remedy was to file civil action to recover $29,600 paid to police. Petitioner filed action against Respondent charging (1) Professional Negligence,

(2) Breach of Contract (3) Breach of Fiduciary trust on May 13, 1988 in Boone County Missouri. Trial was set for Nov. 26,27, of 1990 following hearing on MOTION FOR SUMMARY JUDGMENT FOR DEFENDANT. ORDER GRANTING said judgment was filed October 24, 1990, cancelling JURY TRIAL which Petitioner had formally requested in initial pleadings.

MISSOURI COURT OF APPEALS, WESTERN DISTRICT, Kansas City, affirmed SUMMARY JUDGMENT JULY 30, 1991. MISSOURI SUPREME COURT AFFIRMED ORDER OF Appeals Court, Feb. 25,1992 and denied REHEARING,March 24,1992.

District Judge Roberts declined to sit on the case telling Peitioner that he should not have excused attorney of record for Plaintiff-Petitioner. Counsel could not be found,thus proceeded pro se.

REASONS FOR GRANTING PETITION

A Writ of Certiorari should be granted because of:

(1) the existence of genuine issues of material fact which require the scrutiny of a jury to determine who and what did have responsibility of proximate cause of injury to Petitioner;

(2) the existence of established legal precedent in federal and state cases that govern cases of arrest without probable cause and assault and battery;

(3) the sworn testimony jury which renders the verdict as clearly against the weight of the evidence and as the cause of manifest injustice to Petitioner.

Causation or the inquiry as to who or what caused injury to Petitioner must be for a jury to decide. Liability to client by an attorney exists as does promise to perform with standard of care.

Two damages were caused Petitioner due to dismissal of her USC 42 § 1983 action against Officer Scorse. Untimely notice of Appeal was given as the reason for this dismissal of Cause No. 84-5057-SW.

(1) Damage was pecuniary; the loss of more than $29,000.00 garnished from the bank account of Petitioner, June 10, 1987.

(2) Petitioner incurred injury of the loss of her court action which was her property. Forever lost was her chance to achieve appeal and a new trial to recover damages from False Arrest and the other charges against the police-officer. This property was taken from Petitioner **without due process** and for no act nor failure to act on part of Petitioner. This loss was due to the failure of Respondent to file **timely notice of appeal.**

In conflict with the order to overrul Petitioner's **Motion for Relief** are three recent decisions of this Supreme Court of Missouri, all negligence cases requiring the scrutiny of a jury to evaluate complex facts. Causation is NOT A MATTER A LAW but is discovered by examining probative facts. Two cases were reversed and remanded due to this necessity for jury inquiry:

GAST V. EBERT: 739 S.W. 2nd 545 was truly unusual in that the spoken words of insurance agent to parents of injured daughter was determined as "possible fraud" and could not be solved by summary judgment.

McKim v. Sears Rodeo Assn. 789 S.W.2d 217, due to failure of Appellant to prove that Respondent had any DUTY TO PROTECT Appellant. In contrast, Respondent Attorney had agreed to represent Petitioner in Appeal process. Petitioner had Fiduciary trust with Respondent. The trust was breached.

Negligence cases require proving elements: (1) a duty on part of Defendant to protect Plaintiff, (2) a breach of that duty, (3) causation, (4) Injury to Plaintiff.All these elements could be proven by Petitioner if permission for JURY TRIAL would be permitted.

In RE TESSLER, 783 S.W. 2d 906, (Mo. Banc 1990), attorney was disbarred for allowing statute to run out causing injury to client. Liability to client is settled law in Missouri by statute:

RSMo. 1939§1434) RSMo. §484.160 states(in essence)that judgment for costs and damages may be rendered against attorney amount for costs and damages incurred if attorney was cause.

> "A breach of fidelity to a client's interest, constitutes CONSTRUCTIVE FRAUD" stated

in FISKE V. Buder, 8th Circ., 125 F. 2d 841. Considering the FORESEEABILITY of the danger of missing any court deadline, a jury could understand causation.

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MISSOURI COURT OF APPEALS, WESTERN DISTRICT in Memorandum supporting Order to affirm SUMMARY JUDGMENT for Respondent stated that Petitioner failed to provide the statements of any "EXPERT WITNESS". With the testimony of the arresting offic clearly stating that there was "no crime" nor "any violation" and that Petitioner did not assault him, evidence in the unde lying cause places officer in situation of the aggressor and of having deprived Petitioner of her civil rights. Also, the FAILURE TO FILE TIMELY NOTICE OF APPE by Respondent places this as cause of depriving Petitioner obtaining relief in appeal. Petitioner's cause was taken without due process for this negligence.

Officer Scorse apparently did not know what constitutes legal basis for arrest or that Petitioner had a right to travel without being deprived of her liberty. He stated in court,(TR.VOL.2-page 81) his PROBABLE CAUSE was:

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"The two different incidences, the one of honking the horn.. and the one of, as I said, the nice-looking lady giving me the finger.."

ESTABLISHED PRECEDENTS on FEDERAL level and STATE level were ignored by all Missouri courts in permitting judgment denying trial to Petitioner, since Respondent uses reason that negligence to file TIMELY NOTICE OF APPEAL was not CAUSE OF DAMAGE to Petitioner. Eighth Circuit Court of Appeals would have been governed by rulings on cases of False Arrest and in this refusal to produce identification case, in the relevant case: **ZACKARY C. BROWN V. STATE OF TEXAS, 443 U. S. 47; 61 L.Ed.**

"When officers detained Defendant for purpose of requiring him to identify himself, they performed a 'seizure' of his person subject to the requirements of the FourthAmend."

Again, with the understanding that Respondent and Petitioner dispute the subject of "who and what" caused aforementioned injuries to Petitioner, we examine our body of law governing arrest and assault and battery.

In KANSAS CITY V. FULTON, 533 S. W. 677, Mo. Ct. Appeals, W.D. stated:

> "Arrest is valid only on probable cause", citing U.S.C.A. Fourth; Sections 84,440,84,710 RSMo. 1969, V.A.M.S."

Officer Scorse told jury,

> "There was no suspicion of criminal activity."

(Tr. VOL. 2-page 67; lines 20-25)

Officer who arrested Petitioner gave reason for stopping her ..that he feared for her safety. This appears to be a pretext in that he failed to ask or investigate about her safety, as the record is barren of this action.

STATE v. MAXEY, 661 S.W. 641, (Mo. Ct. App. . E.D. 1983) reversed for same reason..no probable cause of crime.

KOLANDER V. LAWSON, No. 81-1320,33 Cr.L.3063; May 4, 1981; received national attention from media when Lawson became known as the "WALKMAN" and refused to identify himself to police since he had no been even suspected of criminal activity; as in above-styled cause.

A VERDICT which was against all evidence, which failed to name the one who was guilty of committing the assault, which failed to consider self-defense on part of Petitioner, which failed to consider or deal with DEPRIVATION OF RIGHTS OF PETITIONER under FOURTH AMENDMENT was erroneous. A verdict stating only..that Petitioner had "BATTERED OFFICER SCORSE" and failing to recognize that Petitioner was attacked(ASSAULTED) and injured by a police officer who was acting without any legal authority or without any criminal activity even suspected on part of Petitioner, who became a victim.

Police Officer Dan Scorse stated in his testimony in federal district court:

Question to Scorse,
"Did the plaintiff make any physical threat to you?"
SCORSE:
"No".
(Transcript, Vol. 2-p. 73; lines 22,23,24)

ON assault and battery, Scorse testified:

"Yes, I knocked her forward."
(TR. VOL. 2, page 74)

Abuse of discretion on part of Magistrate Richard Ralston in his removal of witness, mother of young lady who had suffered similar treatment from same officer and by accepting into evidence four city ordinances which Petitioner "could have been charged with"..but never had been. Petitioner's objection as to irrelevant material was overruled. Jury may have believed that there actually was some law Petitioner had violated?

RIGHT TO TRIAL BY JURY remains today **INVIOLATE**. Petitioner lost this right by the court's permitting SUMMARY JUDGMENT against her.

As set out in Castellano v. Travelers Ins. Co. 305 So. 2nd F. Supp. "Due process of law clauses of state and federal constitutions are standing guarantees of substantial or arbitrary actions as would prevent litigant from having a substantially fair trial."

CONCLUSION

Petitioner respectfully submits to this Honorable Court that she is entitled to a jury trial to obtain relief from Deprivation of Rights of The Fourth, Fifth, Seventh and Fourteenth Amendments by both the police officer and her counsel and PRAYS THAT SHE WILL BE GRANTED a WRIT Of Certiorari to permit her a jury trial.

DATED: JUNE 22, 1992

Respectfully submitted,

Mary Lou Graham

MARY LOU GRAHAM, en Propia Persona

APPENDIX "A"

Notice of Entry of Order of Judgment

(To be given by clerk to all parties not in default who are not present in open court when order or judgment is entered)
(SUPREME COURT RULE 74.78)

STATE OF MISSOURI)
COUNTY OF BOONE)

IN THE CIRCUIT COURT WITHIN AND FOR COUNTY OF BOONE, STATE OF MISSOURI

Mary Lou Graham
Plaintiff/Petitioner

vs. No. 88CC029321

Jean Goldstein
Defendant/Respondent

To Mary Lou Graham
303 Woods Lane
Cedar Park, Texas 78613

You are HEREBY NOTIFIED that on 10-24-90, the Honorable Ronald Belt entered the order:
10/24/90 Court again takes up Defendant's MOTION FOR SUMMARY JUDGMENT AND SUSTAINS THE SAME. Clerk to notify Plaintiff and counsel for Defendant of this entry.

MAXINE OWENS

Said notice was mailed By_____
on 10/24/90 to:
MARY LOU GRAHAM Robert ROSENTHAL

APPENDIX "B"

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

Mary Lou Graham,)

Appellant,

v.) W.D. 44101

Jean Goldstein,) Order Filed

Respondent.) July 30,1991

APPEAL FROM THE CIRCUIT COURT

BOONE COUNTY

The Honorable Ronald Belt, BEFORE: Shangler, P.J., Lowenstein and Berry, PER CURIAM.

ORDER

Appeal from an order of summary Judgment against the Plaintiff's claim of legal malpractice.

AFFIRMED. Rule 84.16 (B).

APPENDIX "C"

CLERK OF THE SUPREME COURT
State of Missouri
P.O. Box 150
Jefferson City, Missouri
65102

February 25, 1992

Ms. Mary Lou Graham
303 Woods Lane
Cedar Park, Texas 78613

In re: **Mary Lou Graham**

vs.

Jean Goldstein

Supreme Court No. 74518

Dear Ms. Graham:

Please be advised that the Cour
this day entered the following order
the above-entitled cause:

"Petitioner's motion for relief
of order of Missouri Court of
Appeals, Western District, over
ruled."

Yours very truly,

Thomas F. Simon

Becky Judd
Deputy Clerk,
Court en Banc

cc: Mr. Robert S. Rosenthal

APPENDIX "D"

CLERK OF THE SUPREME COURT
STATE OF MISSOURI
Post Office Box 150
Jefferson City, Missouri
65102

March 24, 1992

Ms. Mary Lou Graham
303 Woods Lane
Cedar Park, Texas 78613

In re: Mary Lou Graham
vs.
Jean Goldstein

Supreme Court No. 74518

Dear Ms. Graham:

Please be advised that the Court this day entered the following order in the above-entitled cause:

"Petitioner's motion for rehearing overruled." Covington, J., not participating.

Very truly yours,

Thomas F. Simon

Mary Elizabeth McHaney
Deputy Clerk, Court
en Banc

cc. Mr. Robert S. Rosenthal

APPENDIX "E"
IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Mary Lou Graham,)
Appellant,
v.) W.D.
Jean Goldstein, No. 44101
Respondent.) July 30,1991

MEMORANDUM SUPPLEMENTING ORDER
AFFIRMING JUDGMENT PURSUANT TO
RULE 84.16(b)

THIS MEMORANDUM IS FOR THE INFORMA-
OF THE PARTIES AND SETS FORTH THE REASONS
FOR THE ORDER AFFIRMING THE JUDGMENT.

THIS STATEMENT DOES NOT CONSTITUTE
A FORMAL OPINION OF THIS COURT. IT IS NOT
UNIFORMLY AVAILABLE. IT SHALL NOT BE RE
TED, CITED, OR OTHERWISE USED IN UNRELATED
CASES BEFORE THIS COURT OR ANY OTHER COURT
IN THE EVENT OF THE FILING OF A MOTION TO
REHEAR OR TRANSFER TO THE SUPREME COURT, A
COPY OF THIS MEMORANDUMSHALL BE ATTACHED T
ANY SUCH MOTION.

PLAINTIFF APPEALS FROM AN ORDER OF
SUMMARY JUDGMENT ENTERED AGAINST HER CLAIM
OF LEGAL MALPRACTICE AGAINST RESPONDENT.
SHE CONTENDS THAT THERE ARE GENUINE IS-

SUES OF MATERIAL FACT WHICH REQUIRE THE CASE TO CONTINUE TO TRIAL.

APPELLANT'S SOLE ALLEGATION OF LEGAL MALPRACTICE IS THAT RESPONDENT LAWYER FAILED TO FILE A TIMELY APPEAL IN A CASE WHICH APPELLANT HAD LITIGATED AGAINST OFFICER DANIEL SCORSE OF THE JOPLIN, MISSOURI POLICE DEPARTMENT. IN THAT CASE, WHICH WAS A 42 U.S.C. §1983 ACTION FILED IN THE U.S. DISTRICT COURT OF WESTERN MISSOURI, APPELLANT SOUGHT DAMAGES FOR FALSE ARREST AND FOR INJURIES ALLEGEDLY CAUSED BY SCORSE'S USE OF EXCESSIVE FORCE DURING A TRAFFIC STOP.

APPELLANT'S CASE WENT TO TRIAL ON FEBRUARY 18, 1986. SHE APPEARED PRO SE, AND SHE GAVE THE FOLLOWING VERSION OF THE INCIDENT WHICH PRECIPITATED THE LITIGATION. SHE TESTIFIED THAT AT ABOUT 8:00 P. M. ON MAY 15, 1981, SHE WAS PULLED OVER BY A PO-CAR IN JOPLIN, MISSOURI. SHE STATED THAT THE POLICEMAN, DANIEL SCORSE, STOPPED HER BECAUSE SHE HAD HONKED HER HORN AT HIM.

APPELLANT STATED THAT, AFTER SHE WAS PULLED OVER, SHE GOT OUT OF THE CAR TO TALK

TO SCORSE. SCORSE ASKED APPELLANT SEVERAL TIMES FOR IDENTIFICATION, AND SHE REFUSED TO COMPLY WITH HIS REQUEST. SHE STATED THA BECAUSE SCORSE HAD NOT GIVEN A GOOD REASON FOR STOPPING HER, SHE FELT THERE WAS NO REA SON TO PRODUCE IDENTIFICATION. APPELLANT TESTIFIED THAT SHE STARTED TO GET BACK INT HER VEHICLE, AND SCORSE THEN TOLD HER THAT SHE WAS UNDER ARREST.

AT THIS POINT, ACCORDING TO APPELLA SCORSE BEGAN MANHANDLING HER, AND SHE RES- PONDED BY BITING HIM ON HIS THUMB. THEN, APPELLANT CLAIMED, SCORSE STRUCK HER IN TH UPPER BACK, CAUSING HER TO BRIEFLY LOSE CO SCIOUSNESS. SHE WAS PLACED IN THE BACK SEA OF ANOTHER POLICE VEHICLE, AND CHARGED WIT ASSAULTING A POLICE OFFICER.

OFFICER SCORSE ALSO TESTIFIED AT TRIAL, AND PRESENT A DIFFERENT VERSION OF THE INCIDENT. SCORSE STATED THAT, AS HE WA GIVING A TRAFFIC TICKET TO ANOTHER VEHICLE APPELLANT PASSED BY IN A VAN AND HONKED AT HIM REPEATEDLY. AFTER HE FINISHED WRITING THE TICKET, SCORSE CONTINUED DOWN THE STRE

WHERE HE AGAIN ENCOUNTERED APPELLANT'S VEHICLE AT A NEARBY INTERSECTION. THE VAN STARTED ACROSS THE INTERSECTION AS SCORSE'S VEHICLE APPROACHED IT. ACCORDING TO SCORSE, THE DRIVER "GAVE ME THE FINGER ALL THE WAY ACROSS THE INTERSECTION."

SCORSE FOLLOWED THE VAN AND ACTIVATED HIS OVERHEAD RED LIGHTS. THE VAN PROCEEDED ANOTHER BLOCK DOWN THE STREET, AND THEN CAME TO A SUDDEN STOP. ACCORDING TO SCORSE, APPELLANT EXITED THE VAN AND CAME BACK TO THE PATROL CAR, YELLING, "WHY'D YOU STOP ME, YOU DON'T HAVE ANY REASON TO STOP ME." SCORSE TOLD HER THAT HE WAS STOPPING HER FOR HONKING HER HORN AND FOR MAKING AN OBSCENE GESTURE AT HIM. APPELLANT REPLIED, "I DIDN'T GIVE YOU THE FINGER, BUT I THINK IT'S A GOOD IDEA." THEN, IN SORSE'S WORDS, APPELLANT "GAVE ME THE FINGER RIGHT TO MY FACE."

SCORSE SAID THAT HE ASKED HER REPEATEDLY FOR SOME IDENTIFICATION, AND SHE REPLIED, "I DON'T HAVE TO SHOW YOU ANYTHING" AND TOLD SCORSE SEVERAL TIMES TO "GET

FUCKED." SCORSE THEN INFORMED HER THAT HE WAS GOING TO ARREST HER FOR FAILING TO PRODUCE IDENTIFICATION FOR A POLICE OFFICER. ACCORDING TO SCORSE, APPELLANT RESPONDED, "I'M LEAVING," AND THEN TURNED AND HEADED BACK TO THE VAN.

AS APPELLANT STARTED TOCLIM BACK INTO THE VAN, SCORSE TOLD HER "YOU'RE UNDER ARRES AND GRABBED HER LEFT HAND. SCORSE STATED THA HE HANDCUFFED APPELLANT'S LEFT HAND, WHILE SHE RESISTED BY KIKING HIM AND STOMPING HIS FEET. THEN, SCORSE TESTIFIED, HE PULLED APPELLANT'S OTHER HAND AWAY FROM THE STEERING WHEEL OF THE VAN, AND APPELLANT REACHED DOWN AND BIT HIS THUMB. SCORSE STATED THAT THE BITE PIERCED HIS SKIN, SPLIT HIS FINGERNAIL AND CAUSED HIS HAND TO BLEED AND SWELL. AFTER FURTHER STRUGGLING, SCORSE MANGAGED TO CUFF APPELLANT'S OTHER HAND AND PLACE HER IN HIS VEHICLE.

SCORSE ALSO TESTIFIED THAT HE HAD COMPENSATORY DAMAGES FOR THE MEDICAL EXPENSE WHICH HE HAD INCURRED AS A RESULT OF THE INCIDENT, AS WELL AS FOR THE ATTORNEY'S FEE

WHICH HE HAD INCURRED IN DEFENDING HIMSELF AGAINST APPELLANT'S §1983 CLAIM. HE FURTHER TESTIFIED THAT HE WAS SEEKING PUNITIVE DAMAGES IN THE CASE.

SCORSE ALSO PRESENTED THE TESTIMONY OF KENNTH TATUM AND MICHAEL EDEN, BOTH OF WHOM HAD WORKED WITH THE NEWTON COUNTY SHERIFF'S OFFICE. ACCORDING TO THEIR TESTIMONY, APPELLANT HAD BEEN INVOLVED IN A SIMILAR INCIDENT IN 1979, HEN HER VANHAD BEEN STOPPED BECAUSE OF A SUSPICION THAT THE DRIVER WAS INTOXICATED. AFTER BEING PULLED OVER, APPELLANT CURSE AND SCREAMED AT THE OFFICERS, AND BIT EDEN ON THE FINGER.

FOLLOWING THE PRESENTATION OF EVIDENCE, THE JURY RETURNED A VERDICT AGAINST APPELLANT ON HER § 1983 CLAIM AGAINST SCORSE. THE JURY ALSO FOUND IN FAVOR OF SCORSE ON HIS COUNTERCLAIM, AND AWARD HIM $3,700 IN ACTUAL DAMAGES AND $25,000.00 IN PUNITIVE DAMAGES.

ON MARCH 10, 1986, APPELLANT FILED A PRO SE MOTION FOR A NEW TRIAL. SHE THEN RETAINED RESPONDENT, JEAN GOLDSTEIN, WHO

FILED AN ENTRY OF APPEARANCE AND AN AMEND
MOTION FOR A NEW TRIAL ON APRIL 30, 1986.
THESE MOTIONS WERE DENIED BY THE TRIAL CO
ON MAY 1, 1986. ON JULY, 1986, GOLDSTEIN
FILED A MOTIONFOR LEAVE TO FILE A NOTICE
APPEAL OUT-OF-TIME, WHICH WAS DENIED BY TH
TRIAL COURT.

SUBSEQUENTLY, APPELLANT FILED A LEG
MALPRACTICE ACTION IN THE CIRCUIT COURT OF
BOONE COUNTY, SEEKING DAMAGES FROM RESPON-
DENT FOR HER FAILURE TO TIMELY FILE THE NO
TICE OF APPEAL. RESPONDENT THEN FILED A MO
TION FOR SUMMARY JUDGMENT, ALLEGING THAT
APPELLANT HAD NOT BEEN DAMAGED BY RESPON-
DENT'S FAILURE TO FILE A TIMELY APPEAL BE-
CAUSE ANY APPEAL WOULD HAVE BEEN UNSUCCESS
FUL AS A MATTER OF LAW. RESPONDENT'S MOTIO
FOR SUMMARY JUDGMENT WAS SUSTAINED BY THE
TRIAL COURT.

APPELLANT RAISES NUMEROUS POINTS IN
HER PRO SE BRIEF ON APPEAL. HOWEVER, THEY
REDUCE TO THE SINGLE CONTENTION THAT THE
TRIAL COURT ERRED IN SUSTAINING RESPONDENT
MOTION FOR SUMMARY JUDGMENT BECAUSE GENUIN
ISSUES OF MATERIAL FACT REMAIN UNSOLVED IN

In order to recover for legal malpractice, a plaintiff must establish the attorney's negligence and the loss. Pool v. Burlison, 736 S.W. 2d 485 (Mo. App. 1987). Where the claim is that an attorney failed in some way to prosecute a claim, it must be established that the claim would have been successful but for the attorney's misconduct. Cain v. Hershewe, 760 S.W. 2d 146, 149 (Mo. App. 1988).

Thus, a plaintiff's theory of legal malpractice will fail if it can be established that the underlying action would have been unsuccessful even without the attorney's error. And in such a case, where there is no theory within the record that would permit recovery, a defendant is entitled to summary judgment. Cain v. Hershewe, 760 S.W.2d at 148.

Applying these principles to the case here, we find that summary judgment was appropriate. Appellant's original federal appeal would have failed even if it had been timely filed by respondent. Consequently, appellant

CANNOT SHOW HOW SHE WAS DAMAGED BY RESPONDENT'S ALLEGED PROFESSIONAL MALPRACTICE, AND HER CLAIM THUS FAILS AS A MATTER OF LAW.

THE ONLY WAY THAT APPELLANT COULD HAVE PREVAILED ON APPEAL IN HER ORIGINAL ACTION AGAINST SCORSE WOULD BE IF THE U. S. COURT OF APPEALS FOUNDMERIT IN AN ISSUE WHICH APPELLANT RAISED AT THE TRIAL COURT LEVEL. ISSUES NOT PRESENTED TO THE TRIAL COURT WILL NOT BE CONSIDERED ON APPEAL. AMERICAN GEN. FINANCE CORP. V. PARKWAY BANK & TRUST CO. 520 F. 2D 607, 608 (8TH CIR. 1975). AND, A REVIEW OF THE TRIAL RECORD IN THIS CASE CONVINCES US THAT ALL ISSUES RAISED BY APPELLANT AT THE TRIAL COURT LEVEL ARE WITHOUT MERIT.

AS THE FIRST POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN THE JUDGMENT AGAINST HER. RESPONDENT CLAIMS THAT APPELLANT WAIVED THIS POINT BY FAILING TO ASK FOR A DIRECTED VERDICT AT ANY TIME DURING THE TRIAL. HOWEVER, A READING OF THE TRANSCRIPT INDICATES THAT APPELLANT MOVED FOR A DIRECTED VERDICT AT THE CLOSE OF THE

EVIDENCE. NEVERTHELESS, THERE WAS AMPLE EVIDENCE TO SUPPORT THE JURY'S VERDICT, AND ANY APPEAL BASED ON THE INSUFFICIENCY OF THE EVIDENCE WOULD HAVE BEEN WITHOUT MERIT, AND MOST CERTIANLY WOULD HAVE FAILED.

AS THE SECOND POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THE JURY "REJECTED ANY VERDICT OF ASSAULT AGAINST PLAINTIFF, AND THIS INSTRUCTION WAS REMOVED BY DEFENDANT'S COUNSEL." APPELLANT'S ALLEGATION OF ERROR IS SOMEWHAT UNCLEAR, BUT IT APPARENTLY REFERS TO THE SUBMISSION OF JURY INSTRUCTIONS REGARDING SCORSE'S ASSAULT AND BATTERY COUNTERCLAIM.

IN ITS ORDER DENYING APPELLANT'S MOTION FOR A NEW TRIAL, THE TRIAL COURT PRO- THE FOLLOWING ACCOUNT OF THE JURY INSTRUCTION REFERRED TO IN APPELLANT'S POINT. INITIALLY, SCORSE SUBMITTED TWO CLAIMS TO THE JURY: ONE FOR ASSAULT AND ONE FOR BATTERY. AFTER THE JURY HAD DELIBERATED FOR SOME TIME, IT EXPERIENCED A CONCEPTUAL DIFFICULTY IN DISTINGUISHING BETWEEN THE TORTS OF ASSAULT AND BATTERY. CONSEQUENTLY, WITH THE CONSENT OF BOTH PARTIES, SCORSE'S COUNTERCLAIM FOR

ASSAULT WAS DISMISSED, AND THE INSTRUCTIO
CONCERNING THAT CLAIM WERE WITHDRAWN. ACC
DING TO THE STATEMENT OF FACTS CONTAINED
TRIAL COURT'S ORDER, APPELLANT WAS ADVISE
THAT WITHDRAWAL OF THE ASSAULT CLAIM MIGH
AS A PRACTICAL MATTER, MAKE IT EASIER FOR
THE JURY TO RETURN A VERDICT UPON THE BAT
TERY CLAIM, BUT APPELLANT NEVERTHELESS IN
SISTED THAT SCORSE BE PERMITTED TO WITHDR
THE ASSAULT CLAIM.

APPELLANT FAILED TO MAKE A LEGALL
NIZABLE CLAIM FOR RELIEF REGARDING THE W
DRAWN INSTRUCTION. A PARTY ACQUIESING AT
TRIAL TO THE COURT'S INSTRUCTIONS TO THE
CANNOT CONTEND ON APPEAL THAT THE INSTRU
TIONS WERE ERRONEOUS. BOSTON INS. CO. V.
FISHER, 185 F.2D 977,979 (8TH CIRC. 1950
APPELLANT'S PRO SE MOTION'S SECOND POINT
WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL.

AS THE THIRD AND FOURTH POINTS I
HER PRO SE MOTION FOR A NEW TRIAL, APPEL
CLAIMED THAT SCORSE'S COUNSEL ACTED IMP
PERLY BY ELICITING TESTIMONY THAT
HAD BEEN DRINKING IN A BAR PRIOR TO THE

DENT, AND BY PRESENTING QUESTIONS AND TESTIMONY WHICH FOCUSED ON HER CHARACTER AND MARITAL STATUS.

HOWEVER, NO OBJECTION WAS MADE TO ANY OF THIS TESTIMONY AT THE TIME THAT IT WAS OFFERED. ERROR MAY NOT BE PREDICATED UPON THE ADMISSION OF EVIDENCE UNLESS A TIMELY OBJECTION APPEARS OF RECORD. FED. R. EVID. 103. IF A PARTY FAILS TO OBJECT TO THE ADMISSION OF EVIDENCE AT THE TRIAL COURT LEVEL, NO ERROR IS PRESERVED UNLESS THERE IS PLAIN ERROR INVOLVED. GREGER V. INT. JENSEN, INC. 820 F.2D 937 (8TH CIR. 1987). PLAIN ERROR IS CONFINED TO THE EXCEPTIONAL CASE WHERE THE ERROR HAS SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY, OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS. ID. THERE WAS NO PLAIN ERROR AND APPELLANT'S POINT WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL.

AS THE FIFTH POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THE TRIAL COURT ERRED BY NOT ALLOWING HER TO PRESENT A WITNESS WHO WOULD HAVE TESTIFIED THAT, IN AN UNRELATED INCIDENT, SCORSE

HAD ALSO USED EXCESSIVE FORCE ON ANOTHER PRIVATE CITIZEN. IN ITS ORDER DENYING APPELLANT'S MOTION FOR A NEW TRIAL, THE TRIAL COURT NOTED THAT THIS TESTIMONY WAS PRESENTED AS AN OFFER OF PROOF OUTSIDE THE PRESENCE OF THE JURY. HOWEVER, EVEN THOUGH APPELLANT ATTEMPTED AN OFFER OF PROOF ON THIS EXCLUDED EVIDENCE, HER POINT WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL. THE WITNESS WOULD HAVE TESTIFIED THAT SHE HAD BEEN KNOCKED UNCONSCIOUS DURING AN AUTOMOBILE ACCIDENT AND THAT, AT SOME LATER DATE, AN UNIDENTIFIED PERSON TOLD HER THAT SCORSE HAD ARRIVED AT THE SCENE AND MANHANDLED HER WHILE SHE WAS UNCONSCIOUS. THIS TESTIMONY WAS CORRECTLY EXCLUDED ON THE BASIS THAT IT WAS IMPROPER HEARSAY EVIDENCE.

ALTHOUGH NOT MENTIONED IN HER MOTION FOR A NEW TRIAL, APPELLANT MADE AN ADDITIONAL OFFER OF PROOF CONCERNING SCORSE'S ALLEGED USE OF EXCESSIVE FORCE AGAINST STILL ANOTHER PRIVATE CITIZEN. THE WITNESS, A MAN WITH SEVERAL PRIOR CRIMINAL CONVICTIONS, TESTIFIED THAT HE WAS ONCE RIDING AS A PASSENGER IN AN AUTOMOBILE WHEN IT WAS STOPPED BY ..

SCORSE. ACCORDING TO THE WITNESS, THE DRIVER AND SCORSE EXCHANGED WORDS AND SCORSE SHOVED HIM AGAINST THE CAR. THIS TESTIMONY WAS REJECTEDON RELEVANCY GROUNDS. THERE WAS NO PREJUDICIAL ERROR IN THIS DECISION, AND IT WOULD NOT HAVE CONSTITUTED GROUNDS FOR A SUCCESSFUL APPEAL.

AS THE SIXTH POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THE TRIAL COURT ERRED IN ALLOWING SCORSE TO PRESENT TESTIMONY THAT APPELLANT HAD BEEN INVOLVED IN SIMILAR INCIDENTS WITH OTHER LAW ENFORCEMENT OFFICERS IN THE PAST. HOWEVER, APPELLANT DID NOT OBJECT TO THIS TESTIMONY AT THE TIME THAT IT WAS OFFERED. THEREFORE, OUR DISCUSSION OF THE THIRD AND FOURTH POINTS OF APPELLANT'S PRO SE MOTION ARE APPLICABLE HERE, AS IS OUR CONCLUSION THAT APPELLANT'S POINT WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL.

AS THE SEVENTH POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT SHE HAD BEEN"ABANDONED" BY HER ATTORNEY PRIOR TO TRIAL, AND THAT SHE HAD BEEN FURTHER DISADVANTAGED BY AN ATTORNEY'S LIEN

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WHICH HAD THE EFFECT OF DISCOURAGING OTHER ATTORNEYS FROM REPRESENTING HER. HOWEVER, APPELLANT'S POINT IS NOT ONE WHICH WOULD HAVE BEEN CONSIDERED ON APPEAL. THE REVIEWING FUNCTION OF AN APPELLATE COURT IS ONE ORDINARILY LIMITED TO CONSIDERATION OF THE DECISIONS OF THE COURT BELOW AND OF THE EVIDENCE ON WHICH THEY WERE BASED. UNITED STATES v. CARLO BIANCHI & Co., 373 U.S. 709, 714-15 (1963). APPELLANT'S COMPLAINT ABOUT THE CONDUCT OF A FORMER ATTORNEY DOES NOT INVOLVE ANY ALLEGATION OF ERROR ON THE PART OF THE TRIAL COURT, AND IT WOULD THEREFORE BE IRRELEVANT TO ANY POTENTIAL APPEAL OF HER CASE AGAINST SCORSE.

EVEN IF APPELLANT'S ALLEGATIONS WERE COGNIZABLE ON APPEAL, THEY WOULD CERTAINLY FAIL. NO SUBSTANTIVE EVIDENCE APPEARS IN THE RECORD TO SUPPORT HER CLAIM THAT HER FORMER ATTORNEY -- WHO, ACCORDING TO APPELLANT'S OWN TESTIMONY, DECIDED TO DROP APPELLANT'S CASE OUT OF CONCERNS ABOUT APPELLANT'S VERACITY -- IN ANY WAY "ABANDONED" APPELLANT. SIMILARLY, THERE WAS NO EVIDENCE IN THE RECORD

TO SUPPORT HER CLAIM THAT AN ATTORNEY'S LIEN CHILLED HER ATTEMPTS TO FIND OTHER COUNSEL. AN APPELLATE COURT WOULD HAVE TO GO OUTSIDE THE RECORD TO FIND ANY MERIT TO THIS CONTENTION, AND A REVIEWING COURT WILL ONLY LOOK TO THE RECORD IN DECIDING THE QUESTIONS PRESENTED. LAN V. UNITED STATES, 355 U. S. 339, 354 (1958).

AS THE EIGHTH POINT INHER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT SCORSE HAD BEEN AWARDED AN EXCESSIVE AMOUNT OF PUNITIVE DAMAGES IN HIS COUNTERCLAIM AGAINST HER. MORE SPECIFICALLY, SHE ARGUES THAT THERE WAS NOT A "REASONABLE PROPORTION" BETWEEN THE PUNITIVE AND COMPENSATORY DAMAGE AWARDS.

IN A FEDERAL CASE, THE LAW OF THE PLACE OF THE TORT GOVERNS THE AMOUNT OF DAMAGES RECOVERABLE. WOOD V. STARK TRI-COUNTY BUILDING TRADES COUNCIL, 473 F.2D 272 (6TH CIR. 1973). UNDER MISSOURI LAW, PUNITIVE DAMAGES ARE NOT SPECIFICALLY LIMITED IN PROPORTION TO THE AMOUNT OF THE COMPENSATORY AWARD. ARMSTRONG V. REPUBLIC REALTY MORGAGE

CORP., 631 F.2D 1344, 1351-52 (8TH CIR. 1980). AN AWARD OF PUNITIVE DAMAGES IS PECULIARLY AN FUNCTION OF THE JURY AND, ABSENT ABUSE OF DISCRETION, AN APPELLATE COURT IS NOT JUSTIFIED IN INTERFERING WITH THE ASSESSMENT. HOLCROFT V. MISSOURI-KANSAS-TEXAS R.CO., 607 S.W. 2D 158, 163 (MO. APP. 1980).

THE AMOUNT OF PUNITIVE DAMAGES AWARDED BY THE JURY IS PROPORTIONED TO THE DEGREE OF MALICE, CRIMINALITY OR CONTUMELY CHARACTERIZING THE ACT, TO THE AGE, SEX, HEALTH AND CHARACTER OF THE INJURED PARTY, THE INTELLIGENCE, STANDING AND AFFLUENCE OF THE TORT- AND OTHER LIKE CIRCUMSTANCES. ARMSTRONG V. REPUBLIC REALTY MORTGAGE CORP., 631 F.2D AT 1351-52. GIVEN THE FACTS OF THIS CASE, WE CANNOT SAY THAT THERE WAS AN ABUSE OF DISCRETION IN THE AWARD OF PUNITIVE DAMAGES, AND THIS POINT WOULD NOT HAVE BEEN SUCCESSFUL ON APPEAL.

AS THE NINTH POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT SUGGESTED THE POSSIBILITY OF A CONSPIRACY AMONG THE LAW ENFORCEMENT OFFICERS WHO TESTIFIED AT

THE TRIAL. HOWEVER, THERE IS NO EVIDENCE OF SUCH A CONSPIRACY IN THE TRIAL RECORD, AND THEREFORE HER POINT WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL. AN APPELLATE COURT WOULD HAVE TO GO OUTSIDE THE RECORD TO FIND ANY MERIT TO THIS CONTENTION, AND A REVIEWING COURT WILL ONLY LOOK TO THE RECORD IN DECIDING THE QUESTIONS PRESENTED. LAWN V. UNITED STATES, 355 U.S. 339,354 (1958).

AS THE TENTH POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THE TRIAL COURT ERRED IN ALLOWING SCORSE'S COUNSEL TO CROSS-EXAMINE HER FORMER HUSBAND ABOUT A THREAT WHICH HE MADE TOWARD DEFENDANT SHORT BEFORE TRIAL. HOWEVER, APPELLANT DID NOT OBJECT TO THIS CROSS-EXAMINATION AT THE TIME THAT IT WAS CONDUCTED. THEREFORE, OUR DISCUSSION OF THE THIRD AND FOURTH POINTS OF APPELLANT'S PRO SE MOTION ARE APPLICABLE HERE, AS IS OUR CONSLUSION THAT APPELLANT'S POINT WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL.

AS THE ELEVENTH POINT IN HER PRO SE MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THE TRIAL COUR ERRED IN NOT ALLOWING HER

TO INTRODUCE EVIDENCE THATHER CRIMINAL CONVICTION FOR ASSAULT WAS OVERTURNED ON APPEAL. HOWEVER, HER CONVICTION WAS REVERSED BECAUSE THE INFORMATION WAS DEFECTIVE. CITY OF JOPLIN V. GRAHAM, 679 S.W.2D 897 (MO.APP.1984). THE REVERSAL WAS BASED UPON A TECHNICALITY AND DID NOT ADDRESS THE MERITS OF HER CONVICTION. FURTHERMORE, THE CONVICTION ITSELF WAS NEVER INTRODUCED INTO EVIDENCE. CONSEQUENTLY, THE EXCLUDED EVIDENCE WAS SIMPLY NOT RELEVANT, AND APPELLANT WAS IN NO WAY PREJUDICED BY ITS EXCLUSION. THEREFORE, THE POINT WOULD HAVE BEEN SUCCESSFUL ON APPEAL.

AS THE FIRST POINT IN HER AMENDED MOTION FOR A NEW TRIAL, APELLANT CLAIMED THAT THE VERDICT AND THE AWARD OF PUNITIVE DAMAGES WERE AGAINST THE WEIGHT OF THE EVIDENCE HOWEVER, THE SAME CLAIMS WERE RAISED IN THE FIRST AND EIGHTH POINTS OF HER PRO SE MOTION FOR A NEW TRIAL AND, FOR THE REASONS DISCUSSED ABOVE, WOULD HAVE BEEN UNSECCESSFUL ON APPEAL.

AS THE SECOND POINT IN HER AMENDED MOTION FOR A NEW TRIAL, APPELLANT CLAIMED

THAT THE TRIAL COURT ERRED BY SEPARATING HER CLAIMS AGAINST SCORSE AND AGAINST THE CITY OF JOPLIN INTO TWO TRIALS. APPELLANT CONTENDED THAT THIS BIFURCATION OF HER CLAIMS PREJUDICED HER IN THE SCORSE TRIAL BECAUSE SHE WAS NOT ALLOWED TO PRESENT EVIDENCE OF COMPLAINTS TO THE POLICE DEPARTMENT ABOUT CONDUCT OF ITS OFFICERS.

A TRIAL COURT'S SEVERANCE OF TRIAL WILL NOT BE DISTURBED ON APPEAL EXCEPT FOR AN ABUSE OF DISCRETION. BEECK V. AQUASLIDE 'N' DIVE CORP., 562 F.2D 537, 541(8TH CIR.1977) THERE WAS NO SUCH ABUSE OF DISCRETION IN THE CASE AT BAR. ANY LIABILITY WHICH THE CITY OF JOPLIN MIGHT HAVE HAD TOWARD APPELLANT WAS WHOLY DEPENDENT ON A FINDING OF LIABILITY ON THE PART OF SCORSE. THEREFORE, AS A MATTER OF JUDICIAL ECONOMY, IT WAS A SOUND PRACTICAL DECISION TO ADJUDICATE APPELLANT'S CLAIM AGAINST SCORSE FIRST. APPELLANT'S POINT WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL.

AS THE THIRD POINT IN HER AMENDED MOTION FOR A NEW TRIAL, APPELLANT CLAIMED

THAT SHE SHOULD BE GRANTED A NEW TRIAL BECAUSE SHE PROCEEDED WITH THE TRIAL AGAINST SCORSE WITHOUT THE BENEFIT OF COUNSEL. HOWEVER, THE SAME CLAIM WAS RAISED IN THE SEVENTH POINT OF HER PRO SE MOTION FOR A NEW TRIAL AND, FOR THE REASONS DISCUSSED ABOVE, WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL. FURTHERMORE, WE NOTE THAT, ALTHOUGH A PRO SE LITIGANT MUST BE GIVEN FAIR AND EQUAL TREATMENT, SUCH A LITIGANT CANNOT GENERALLY BE PERMITTED TO AVOID THE RISKS OF FAILURE THAT ATTEND HIS OR HER DECISION TO FOREGO EXPERT ASSISTANCE. DOZIER V. FORD MOTOR CO., 702 F. 2ND 1189, 1194 (D.C. CIR. 1983).

AS THE FOURTH POINT IN HER AMENDED MOTION FOR A NEW TRIAL, APPELLANT CLAIMED THAT THE TRIAL COURT ERRED BY NOT ALLOWING HER TO INTRODUCE EVIDENCE THAT HER CRIMINAL CONVICTION FOR ASSAULT WAS OVERTURNED ON APPEAL. HOWEVER, THE SAME CLAIM WAS RAISED IN THE ELEVENTH POINT OF HER PRO SE MOTION FOR A NEW TRIAL AND, FOR THE REASONS DISCUSSED ABOVE, WOULD HAVE BEEN UNSECCESSFUL ON APPEAL. APPELLANT ALSO MADE A NUMBER OF OBJECTIONS DURING

THE TRIAL WHICH WERE NOT INCLUDED IN HER PRO SE OR AMENDED MOION FOR A NEW TRIAL. FIRST, SHE OBJECTED TO A HYPOTHTICAL QUESTION WHICH THE ATTORNEY FOR THE CITY OF JOPLIN ASKED LARRY TENNIS, CHIEF OF POLICE. SECOND, SHE OBJECTED TO THE INTRODUCTION OF CERTAIN CITY ORDINANCES INTO EVIDENCE. HOWEVER, THESE OBJECTIONS WOULD HAVE OFFERED HER NO BASIS FOR RELIEF ON THE GROUNDS OF PLAIN ERROR. THE TRIAL COURT WAS SCRUPULOUS IN ITS EFFORTS TO PROVIDE A FAIR FORUM FOR APPELLANT AS SHE PROCEEDED PRO SE THROUGH THE ADJUDICATION OF HER CLAIMS. THUS, ANY ARGUMENT PREDICATED ON PLAIN ERROR WOULD HAVE BEEN UNSUCCESSFUL ON APPEAL.

IN ANY EVENT, THE TRIAL COURT'S ORDER BECAUSE APPELLANT FAILED TO REBUT RESPONDENT'S MOTION FOR SUMMARY JUDGMENT. IN HER AFFIDAVIT RESPONDENT PROVIDED EXPERT TESTIMONY THAT APPELLANT WAS NOT PREJUDICED BY RESPONDENT'S FAILURE TO FILE AN APPEAL IN THE UNDERLYING ACTION BECAUSE SUCH AN APPEAL WOULD HAVE BEEN UNSUCCESSFUL. APPELLANT FAILED TO RESPOND BY SHOWING THAT THE SUBJECT OF

CAUSATION WAS A GENUINE ISSUE FOR TRIAL. A CLAIM OF LEGAL MALPRACTICE GENERALLY REQUIRES EXPERT TESTIMONY TO ESTABLISH BOTH NEGLIGENCE AND CAUSATION. COOPER V. SIMON, 719 S. W. 2D 463, 465 (MO. APP. 1989). IN THE ABSENCE OF SUCH TESTIMONY IN APPELLANT'S COUNTER-AFFIDAVIT, HER ARGUMENT THAT SHE HAD A VIABLE APPEAL FORM THE UNDERLYING CAUSE OF ACTION WAS INSUBSTANTIAL.

ACCORDINGLY, THE ORDER OF SUMMARY JUDGMENT IS AFFIRMED.

IN THE SUPREME COURT OF THE
UNITED STATES OF AMERICA

SUMMER TERM, 1992

No._____

Mary Lou Graham, Petitioner

vs.

Jean Goldstein, Respondent

_Proof of Service

I, Mary Lou GRaham, do swear or declare that on this date, the 22 day of June, 1992, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, by depositing an envelope containing the above documents with the U.S POST OFFICE, properly affixed thereonk, and also each envelope was mailed with return receipt. Documents are mailed to:

Robert S. Rosenthal, Attorney-at-law
#22660
705 Olive Street, Suite 1100
St. Louis, Missouri 63101

Subscribed and sworn before me on this 22 day of June, 1992, Greene Co.MO.
I do so affirm:

Paula Mercer
Commission Exp. 6-26-94

Mary Lou Graham

MARY LOU GRAHAM,
Petitioner, ProSe

SUPREME COURT U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

No. 91-2064

IN THE

Supreme Court of the United States

SUMMER TERM, 1992

MARY LOU GRAHAM,
Petitioner,

VS.

JEAN GOLDSTEIN,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

BRIEF OF RESPONDENT JEAN GOLDSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	iii
Reasons for Denying the Petition	1
I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER SEEKS REVIEW OF AN ORDER DENYING A MOTION WHICH WAS FILED AFTER THE TIME FOR APPEALING HAD EXPIRED WHICH IS NOT A DECISION SUBJECT TO REVIEW BY THIS COURT	3
II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO SPECIFY THE PARTICULARS, IF ANY, CONCERNING EARLIER PROCEEDINGS INVOLVING A FEDERAL QUESTION	4
III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CANNOT RAISE FOR THE FIRST TIME ON A WRIT OF CERTIORARI A FEDERAL CONSTITUTIONAL CHALLENGE WHICH WAS NEVER RAISED, PRESERVED OR PASSED UPON IN THE STATE COURTS BELOW	5
IV. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS NOT DEMONSTRATED SPECIAL AND IMPORTANT REASONS FOR REVIEW BY THIS COURT	6

V. NOTWITHSTANDING PETITIONER'S FAILURE TO SEEK REVIEW OF A MISSOURI COURT DECISION WHERE A FEDERAL QUESTION WAS RAISED FOR REVIEW BY THIS COURT, THE SUPREME COURT OF MISSOURI PROPERLY OVERRULED PETITIONER'S MOTION FOR RELIEF OF ORDER 7

Conclusion 8

Appendix A

Motion for Relief of Order of Missouri Court of Appeals A-1

TABLE OF AUTHORITIES

	Page
Cases:	
Cardinale v. Louisiana, 394 U.S. 437, 438 (1969)	6
Cain v. Hershewe, 760 S.W.2d 146 (Mo.App. 1988) ...	7
Cooper v. Simon, 719 S.W.2d 463 (Mo.App. 1986).....	7
Statutes:	
42 U.S.C. 1983	7
Rules:	
Supreme Court Rule 10	4, 6
Supreme Court Rule 13	3, 4
Supreme Court Rule 14	2, 4
Missouri Supreme Court Rule 84.16	3
Missouri Supreme Court Rule 84.17	8

No. 91-2064

IN THE

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SUMMER TERM, 1992

MARY LOU GRAHAM,

Petitioner,

VS.

JEAN GOLDSTEIN,

Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Missouri

BRIEF OF RESPONDENT JEAN GOLDSTEIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

This is a civil action brought by Petitioner who sought to recover damages based upon alleged legal malpractice. Petitioner's sole allegation of professional negligence against Respondent is that she failed to file a timely appeal of an Order denying a Motion for New Trial in a federal civil rights case which was pending in the United States District Court of the Western District of Missouri, which Petitioner tried *pro se*. Summary Judgment was entered in favor of Respondent and Petitioner appealed to the Missouri Court of Appeals, Western

District. On July 30, 1991, the Missouri Court of Appeals filed its Order and Memorandum Supplementing Order affirming Judgment in favor of Respondent. The Petitioner filed a Motion for Rehearing in the Missouri Court of Appeals, Western District, which was not accepted for filing because it was not timely. Petitioner did not file a Motion to Transfer to the Supreme Court of Missouri. Thereafter, Petitioner filed a Motion for Relief of Order in the Supreme Court of Missouri which was overruled. Then, Petitioner filed a Motion for Rehearing in the Supreme Court of Missouri which was overruled. On June 22, 1992, Petitioner filed her Petition for Writ of Certiorari in this Court.

This case presents no basis to authorize review of the Order of the Supreme Court of Missouri by Writ of Certiorari. Petitioner did not perfect an appeal to the Supreme Court of Missouri. Nearly six months after the entry of the Order affirming Judgment by the Missouri Court of Appeals, Western District, Petitioner filed what she entitled as a Motion for Relief of Order. The Order, which is the subject of this Petition for Writ of Certiorari, is not a decision or judgment which is subject to review by this Court.

In violation of Supreme Court Rule 14.1(h), Petitioner has failed to specify in her Petition at what stage of the state court proceedings a federal question was raised. Indeed, Petitioner could not because the questions presented for review by this Court were not previously raised. In effect, Petitioner now attempts to raise a federal constitutional issue for the first time in this Court. This she may not do.

Furthermore, even if Petitioner properly raised and preserved a federal constitutional issue in the court below, no ground for issuance of a Writ of Certiorari exists. As a matter of law, Petitioner's alleged professional negligence action against Respondent failed as a matter of law.

For these reasons, Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER SEEKS REVIEW OF AN ORDER DENYING A MOTION WHICH WAS FILED AFTER THE TIME FOR APPEALING HAD EXPIRED WHICH IS NOT A DECISION SUBJECT TO REVIEW BY THIS COURT.

In this case, Petitioner seeks a Writ of Certiorari from this Court to review the "judgment of Supreme Court of Missouri affirming Summary Judgment for Respondent . . ." Petition for Writ of Certiorari, p. 1. In fact, there has been no judgment of the Supreme Court of Missouri affirming summary judgment in the proceedings below. As mentioned above, the Missouri Court of Appeals, Western District, filed its Order and Memorandum Supplementing Order Affirming Judgment pursuant to Rule 84.16(b) on July 30, 1991. The Petitioner's Motion for Rehearing in the Missouri Court of Appeals, Western District, was not accepted for filing because it was not timely. Petitioner did not file a Motion to Transfer to the Supreme Court of Missouri. Thus, Petitioner did not seek review of the Missouri Court of Appeals' Order Affirming Judgment by the Supreme Court of Missouri in an accepted procedural manner.

Nearly six months after the entry of Order Affirming Judgment by the Missouri Court of Appeals, Petitioner filed a Motion for Relief of Order with the Supreme Court of Missouri. This motion was overruled on February 25, 1992 and is the "judgment" which Petitioner requests this Court to review. It should be noted that Petitioner does not invite review of the July 30, 1991 Order of the Missouri Court of Appeals, Western District. This is not surprising in that the time for petitioning for review of that Order has long since expired pursuant to Supreme Court Rule 13.1.

Undoubtedly, the Order of the Supreme Court of Missouri overruling Petitioner's Motion for Relief is not a judgment contemplated for review by Supreme Court Rules 10 and 13. Astoundingly, the issues presented for review in this Court were not even raised in the Supreme Court of Missouri by way of Petitioner's Motion for Relief of Order. Consequently, Petitioner's Motion for Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS FAILED TO SPECIFY THE PARTICULARS, IF ANY, CONCERNING EARLIER PROCEEDINGS INVOLVING A FEDERAL QUESTION.

Petitioner seeks a Writ of Certiorari from this Court to address alleged deprivation of constitutional rights. The Petitioner for Writ of Certiorari should be denied because Petitioner has failed to specify the particulars, if any, concerning earlier proceedings on a federal constitutional question.

Supreme Court Rule 14 governs the contents of a Petition for Writ of Certiorari. Where the petition invites review of the judgment of a state court, Supreme Court Rule 14.1(h) requires:

> [T]he statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts;

Rule 14 further provides that the failure of a Petitioner to present in a Petition whatever is essential to a ready and adequate understanding of the points under consideration is a sufficient reason for denying the Petition. Sup.Ct.R. 14.5

In the present case, Petitioner has wholly failed to comply with the mandate of Rule 14. The Petition for Writ of Certiorari fails

to specify at what stage of the proceedings before the courts of the State of Missouri, if any, that a federal question was raised or passed upon. Indeed, Petitioner has not only failed to specify the particulars of an alleged federal question, but has also failed to state whether a federal question was ever raised at all in the court below. Consequently, since Petitioner failed to specify the particulars, if any, concerning earlier proceedings on a federal question, the Petition for Writ of Certiorari should be denied.

III. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER CANNOT RAISE FOR THE FIRST TIME ON A WRIT OF CERTIORARI A FEDERAL CONSTITUTIONAL CHALLENGE WHICH WAS NEVER RAISED, PRESERVED OR PASSED UPON IN THE STATE COURTS BELOW.

Petitioner seems to suggest that a Writ of Certiorari should be issued in the present case because of purported violations of constitutional rights. As demonstrated in the previous point, Petitioner has failed to specify whether a federal constitutional question was ever raised at all in the courts of the State of Missouri. A review of Petitioner's appendices shows that the questions presented by Petitioner in this Court were not previously raised. Absent presentation of such an issue in the courts of Missouri, Petitioner cannot raise for the first time on a Writ of Certiorari a federal constitutional challenge which was never raised, preserved or passed upon in the state courts below.

Justice White for the Court stated the rule as follows:

> . . . [T]he fact emerged in oral argument that the sole federal question argued here had never been raised, preserved or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on the review of state court decisions. In *Crowell v. Randell,* 10

> Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), 1789 [citation omitted] vested this Court with no jurisdiction unless a federal question was raised and decided in the state courts below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion . . . and since . . .

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Consequently, since the record demonstrates that the questions presented before this Court were not raised, preserved, or passed upon in the state courts below, none may be raised in this Court. Thus, the instant Petition for Writ of Certiorari should be denied.

IV. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS NOT DEMONSTRATED SPECIAL AND IMPORTANT REASONS FOR REVIEW BY THIS COURT.

Petitioner invites review of this case because of "the existence of genuine issues of material fact . . .", "the existence of established legal precedent in federal and state cases that govern cases of arrest without probable cause and assault and battery" and because the jury verdict was "against the weight of the evidence and as the cause of manifest injustice to Petitioner." Petition for Writ of Certiorari, page 8.

Supreme Court Rule 10 sets forth the considerations governing review by this Court on Writ of Certiorari. Clearly, the reasons raised by Petitioner in this Court do not meet the established criteria. This case is simply one for alleged legal

malpractice which resulted in Summary Judgment against Petitioner. This alleged legal malpractice action did not necessitate a decision on a federal question, constitutional or otherwise. This case of alleged legal malpractice does not involve any questions of imperative public importance. Petitioner has simply not demonstrated any basis for review by this Court.

V. NOTWITHSTANDING PETITIONER'S FAILURE TO SEEK REVIEW OF A MISSOURI COURT DECISION WHERE A FEDERAL QUESTION WAS RAISED FOR REVIEW BY THIS COURT, THE SUPREME COURT OF MISSOURI PROPERLY OVERRULED PETITIONER'S MOTION FOR RELIEF OF ORDER.

Contrary to Petitioner's assertion, the sustention of summary judgment in favor of Respondent has not resulted in manifest injustice. The sole allegation of legal malpractice in the trial court was that Respondent failed to file a timely appeal in a 42 U.S.C. 1983 action which Petitioner filed *pro se*. Where the claim is that an attorney failed in some way to prosecute a claim it must be established that the claim would have been successful but for the attorney's negligence and where there is no theory within the record that would permit recovery, summary judgment is appropriate. *Cain v. Hershewe*, 760 S.W.2d 146, 148-49 (Mo.App. 1988). Even if Petitioner's federal appeal had been timely filed, it would have failed as a matter of law. Petitioner could not show that she was damaged by Respondent's alleged professional malpractice.

In any event, Respondent provided expert testimony by affidavit that Petitioner was not prejudiced by the failure to file an appeal because such an appeal would have been unsuccessful. Petitioner failed to respond to this assertion with expert testimony by counter-affidavit. Generally, a claim for legal malpractice requires expert testimony to establish negligence and causation. *Cooper v. Simon*, 719 S.W.2d 463, 465 (Mo.App. 1986).

Thus, while Petitioner did not perfect an appeal of the entry of summary judgment to the Supreme Court of Missouri and even though the case certainly does not entail a federal question, summary judgment was properly affirmed.

Petitioner's Motion for Relief in the Supreme Court of Missouri questioned the constitutionality of the refusal of the clerk of the Western District of Missouri Court of Appeals to accept for filing Petitioner's Motion for Rehearing. Clearly, this was proper pursuant to Missouri Supreme Court Rule 84.17. It cannot be reasonably questioned that the Missouri Supreme Court is entitled to promulgate appellate deadlines. In any event, Petitioner has abandoned this argument in this Court.

For these additional reasons, the Petition for Writ of Certiorari should be denied.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent

APPENDIX

APPENDIX A

IN THE SUPREME COURT
STATE OF MISSOURI

No. ____

MARY LOU GRAHAM,
PETITIONER,

VS.

JEAN GOLDSTEIN,
RESPONDENT.

MOTION FOR RELIEF OF ORDER OF MISSOURI COURT OF APPEALS, WD.

COMES NOW MARY LOU GRAHAM, APPELLANT-PETITIONER IN CAUSE NO. W.D. 44101, *AS ABOVE) FROM MISSOURI COURT OF APPEALS, APPEARING IN PROPIA PERSONA PURSUANT TO RULES OF MISSOURI CIVIL PROCEDURE NO. 74.06(D), AND 84.03 TO MOVE THIS HONORABLE COURT TO PERMIT HER RELIEF FROM THE ORDER FILED IN SAID CAUSE JULY 30, 1991 FOR THE FOLLOWING REASONS:

(1) THE AFFIRMATION OF SUMMARY JUDGMENT FOR RESPONDENT WILL RESULT IN MANIFEST INJUSTICE TO PETITIONER.

(2) THE MISSOURI COURT OF APPEALS FAILED TO APPLY ALREADY ESTABLISHED HOLDINGS IN SIMILAR CASES INVOLVING:

A. FALSE ARREST WITHOUT PROBABLE CAUSE;

B. PUNITIVE DAMAGES WITHOUT PROOF OF MALICE;

C. CASES OF SELF-DEFENSE IN ASSAULT & BATTERY;

D. SUMMARY JUDGMENT WHEN ISSUES OF FACT EXIST IN COMPLICATED CASES OF PROFESSIONAL NEGLIGENCE;

(3) THE REFUSAL TO FILE PETITIONER'S MOTION FOR REHEARING BY CLERKS OF MISSOURI COURT OF APPEALS, WD. AUGUST 15, 1991, INDICATED RULES 44.01(E) AND 4.01 CONCERNING USING U.S. POSTAL SERVICE IN MOTIONS AND PAPERS, WAS A VIOLATION OF SAID RULES OF MISSOURI COURT AND VIOLATION OF RIGHTS OF PETITIONER TO DUE PROCESS AS GUARANTEED HER IN BILL OF RIGHTS OF MISSOURI CONSTITUTION AND UL [SIC] S. CONSTITUTION.

TO OBTAIN SAID RELIEF APPELLANT-PETITIONER ATTACHES HER AFFIDAVIT, PURSUANT TO RULE 84.03RMO.RULES OF PROCEDURE TO SEEK REVIEW OF SAID IRREGULARITIES WHICH THREATEN PETITIONER WITH MANIFEST INJUSTICE IF THIS ORDER TO AFFIRM SUMMARY JUDGMENT STANDS. (COPY OF ORDER ATTACHED).

RESPECTFULLY SUBMITTED,

/S/ MARY LOU GRAHAM
MARY LOU GRAHAM, PROPIA PERSONA
303 WOODS LANE
CEDAR PARK, TEXAS 78613
512-259-1776

A TRUE COPY OF THE FOREGOING WAS MAILED BY CERTIFIED/RETURN MAIL ON THE 21ST DAY OF JANUARY, 1991 TO ALL PARTIES TO THIS ACTION AS ARE LISTED BELOW:

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